Leonardo v County of Westchester

2021 NY Slip Op 33509(U)

January 4, 2021

Supreme Court, Westchester County

Docket Number: Index No. 67133/2018

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARIA LEONARDO and BRYAN LEONARDO,

Plaintiffs,

-against-

Index No. 67133/2018
DECISION and ORDER
Motion Sequence No. 1

COUNTY OF WESTCHESTER and WESTCHESTER COUNTY PARKS DEPARTMENT,

Defendants.

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RUDERMAN, J.

The following papers were considered on the motion by defendants County of Westchester and Westchester County Parks Department for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A – G, Affidavit, and Memorandum of Law	1
Affirmation in Opposition, Memorandum of Law, Affidavit, Exhibits 1 – 5	2
Reply Affirmation	3

In this personal injury action, plaintiff Maria Leonardo[1] alleges that she was injured on August 25, 2017 in a trip-and-fall accident in the doorway of a rental cabin in Croton Point Park. She alleges that first her foot caught on a broken floor tile while exiting the cabin, then, when she placed her hands on the door frame to catch herself, the door frame shifted, causing her to misstep, and resulting in injury. Plaintiffs served a Notice of Claim dated November 10, 2017, and commenced this action by filing a summons and complaint on October 12, 2018. A trial

[1] The claims of plaintiff Bryan Leonardo are solely derivative in nature, and references to "plaintiff" in the singular will refer to plaintiff Maria Leonardo.

readiness order was filed by the Court on August 10, 2020, and a note of issue was filed on August 13, 2020.

In the present motion, filed on September 24, 2020, defendants argue that one of the defective conditions claimed by plaintiff, as described at her deposition and as depicted in the photographs defendants submit, is a missing piece of a broken floor tile, which they contend created only a de minimis height differential and as such is non-actionable. They contend that the other claimed defect, the shifting door frame, was a latent condition of which they had no notice. They submit an affidavit of Phil Manuli, who was the Park's foreman and acting superintendent on the date of plaintiff's accident. Manuli states that he conducted an inspection of the cabins prior to the beginning of the rental season of 2017, which runs from May 1st to October 31st, and that he would have repaired any defective and/or dangerous condition he found. In addition, he states that there were no complaints about the condition of the subject cabin from other renters during the 2017 season prior to plaintiff's visit. He explains that after plaintiff's accident an inspection of the subject cabin was made and it was discovered that erosion around the front entrance occurred which may have caused the door frame to shift slightly, but that assuming the condition contributed to loosening the door frame, it was not noticeable prior to plaintiff's accident, and it cannot be determined when the condition developed. According to Manuli, the door frame condition was not present during the inspection of the cabin prior to the 2017 rental season. Finally, Manuli characterizes the broken tile as creating only a 1/8" height differential.

In opposition, plaintiffs submit, inter alia, video recordings showing the condition of the cabin's door frame on the date of the accident, in one of which it is demonstrated that the frame

has pulled away from the cabin wall and can be moved approximately an inch, the other which shows that the bottom of the door frame, containing the saddle of the door's threshold, can be tilted away from the wall and shifted up and down. Plaintiffs also submit photographs showing the saddle of the door frame raised up from the floor, and that the step down from the cabin floor to the landing outside was approximately 12 inches.

Discussion

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see Gardella v Remizov*, 144 AD3d 977, 979 [2d Dept 2016]). If the movant presents a prima facie showing of its entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendants' submissions on this motion fail to establish their right to dismissal of the complaint. The portions of plaintiff's deposition and hearing testimony on which they rely do not establish that the defect on which she claims to have caught her foot was non-actionable as a matter of law; whether a dangerous or defective condition exists so as to create liability is not solely a function of its depth, but rather, "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d

976, 977 [1997]). Nor do the poor-quality photographs provided as exhibits make such a definitive showing. The assertion by Manuli that the missing piece of broken tile created a height differential of only 1/8" does not establish defendants' non-liability as a matter of law, since the photograph of the floor near the doorway does not establish that the height differential between the tile and the subflooring beneath is the only characteristic of the defect. The characterization of the floor defect as "open and obvious" does not establish a right to relief, because "[p]roof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition" (*Holmes v Macy's Retail Holdings, Inc.*, 184 AD3d 811, 811 [2d Dept 2020], citing *Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 635-636 [2d Dept 2010] and *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

Manuli's claim that the "eroded" condition of the door frame was not known to him up to the time of plaintiff's accident, merely establishes that he did not have actual notice of the condition. There still remains a question of whether he should have known of it by the time of plaintiff's accident.

Moreover, even assuming that defendants' submissions establish their claims that the spot on the floor with the missing piece of broken tile constitutes a de minimis defect, and that they had no actual or constructive notice of the condition of the door frame, plaintiffs' submissions in opposition create questions of fact that preclude summary judgment. The condition of the floor near the threshold, as depicted in plaintiffs' submissions, creates questions of fact as to whether the condition on which plaintiff's foot got caught was an actionable defect. Similarly, the video footage and plaintiffs' photographs show significant damage to the door frame and the manner in

which it was secured to the cabin, creating questions of fact as to whether appropriate inspection would have disclosed the defect.

Nor have defendants established grounds to reject the aspect of plaintiffs' claim asserting that the step from the cabin threshold to the ground below was steeper than allowed by regulation. Not only did plaintiffs' bill of particulars state in paragraph 11 that "[t]he subject step is in violation of 19 NYCRR 1220, Section R311"; in paragraph 6 it also described the alleged problem with the step, stating that defendants had "creat[ed] and/or allow[ed] a dangerous and unsafe condition by constructing and/or allowing the step leading to the outside to be of an unsafe height greater than required by applicable laws and regulations." Therefore, plaintiffs' current, slightly more specific citation to 19 NYCRR § 1220.2 and RCNYS [Residential Code of New York State] R311.3.1, which directs that the floor or landing on the exterior side of a required egress door "shall not be more than 8 ¼ inches below the top of the threshold," neither raises a new claim, nor causes any prejudice to defendants. Finally, plaintiffs' failure to offer expert testimony to establish this claimed regulatory violation does not entitle defendants to any relief here. Since defendants did not make a prima facie showing of a right to dismissal of this aspect of plaintiffs' claims, plaintiffs had no burden of coming forward with expert testimony supporting it.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part of the Supreme Court, Westchester County on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 4, 2021

Terry Jane Ruderman

HON. TERRY JANE RUDERMAN, J.S.C.